NABORS DRILLING (LABUAN) CORPORATION v. LEMBAGA PERKHIDMATAN KEWANGAN LABUAN

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
NALLINI PATHMANATHAN FCJ
RHODZARIAH BUJANG FCJ
[CIVIL APPEAL NO: 01(i)-25-09-2019(S)]
2 OCTOBER 2020

CIVIL PROCEDURE: *Judicial review – Appeal – Application to quash decision of financial services authority – Leasing of oil rig to Malaysian resident subject to certain conditions – Leasing company entered into leasing transaction without approval of financial services authority and without paying leasing fees – Leasing company belatedly applied for approval 20 months later – Whether approval had retrospective effect – Whether guidelines upon which decision was based on contradicted statutes and were ultra vires – Principle of generalibus specialia derogant – Labuan Financial Services Authority Act 1996, ss. 3(2) & 4 – Labuan Companies Act 1990, s. 7(5) & (6)*

The respondent was set up under the Labuan Financial Services Authority Act 1996 ('LFSAA'). Section 3(2) of the LFSAA provided that the respondent was the central regulatory, supervisory and enforcement authority of the international business and financial services industry in Labuan. Section 4 of the LFSAA gave further powers to the respondent to not only administer and enforce the provisions of the LFSAA but also other laws stated in the Schedule ('Labuan laws'). The appellant, being a leasing company registered under the Labuan Companies Act 1990 ('LCA'), came within the supervisory and regulatory reach of the respondent. The respondent had initially granted approval to the appellant to lease an oil rig to a Malaysian resident. The Labuan Financial Services and Securities Regulations 2010 ('LFSSR') stipulates a fee of RM60,000 for approval of a single leasing transaction with a resident and a fee of RM20,000 for a subsequent transaction with a Malaysian resident. The appellant entered into a subsequent leasing transaction without the approval of the respondent and without paying any leasing fees under the LFSSR. The appellant belatedly applied for approval 20 months later and the respondent rejected the appellant's application and appeals. The respondent eventually granted approval, but the approval was not made retrospective ('respondent's decision'). Despite accepting the respondent's decision and paying RM20,000, the appellant commenced an application for judicial review at the High Court for, *inter alia*, a *certiorari* to quash the respondent's decision.

In its application, the appellant sought, *inter alia*, a declaration that the Guidelines on the Establishment and Operations of Labuan Leasing Business ('guidelines') do not have the force of law for it served only to clarify the requirements under the LFSSA. The application was dismissed by the High Court on the grounds that (i) the guidelines were not inconsistent with s. 7(6) of the LCA or any other Labuan laws because s. 7 was a general provision on a Labuan's company limitation when carrying out business with a resident and not specifically with a Labuan company with a leasing licence; (ii) the LFSSR specifically deals with the collection of fees by the respondent, as authorised by s. 189 of the LFSSA upon the approval of a leasing transaction and a subsequent one; (iii) the guidelines have the force of law unless it contradicts the primary legislation for the reason that the respondent had been empowered to enforce all the Labuan Acts and was given the power to issue guidelines 'to clarify any provision' of the said Labuan Acts or 'any other matters relating to Labuan financial services'; (iv) the requirement to obtain its approval for a subsequent leasing transaction fell squarely within the authority of the respondent; (v) a regulatory authority that is statutorily empowered by Parliament should be allowed to issue guidelines and collect fees; (vi) the appellant, having accepted the leasing license with conditions, one of which was compliance with the guidelines and the LFSSR, could not seek relief to overturn the conditions stated in the licence; and (v) the respondent's refusal to grant retrospective approval was not an unreasonable exercise of administrative power considering that the appellant had inordinately delayed seeking that approval by about 20 months and there had been earlier rejections of the retrospective approval sought by the appellant. The decision of the High Court was affirmed by the Court of Appeal. Hence, the present appeal.

Held (dismissing appeal with costs)
Per Rhodzariah Bujang FCJ delivering the judgment of the court:

(1) The appellant only made the application for the approval of the leasing transaction some 20 months after entering into that transaction. Equally important to consider was its other conduct in accepting the non-retrospective approval for the transaction by effecting the payment. Such conscious conduct by the appellant, viewed cumulatively, must surely be held against it for it raised the application of the principle of law. (para 16)

(2) Although on the surface it would appear from the legislative provisions that the dispensation of the need by a Labuan company to notify the respondent of the licensed activity with a resident under the LFSSA or the Labuan Islamic Financial Services and Securities Act 2010 that there is indeed a liberalisation of the law, nevertheless when one were to

consider the fact that the authority which must be notified (under s. 7(5) of the LCA) or not notified (under s. 7(6) of the LCA) in the LCA is the very same authority who is empowered to grant the approval for the transaction under the guidelines, the said dispensation is pure common sense. Why is there a need to notify oneself when one has given the approval? That surely is a pure redundancy of action which defied logic and that defiance was even more obvious after considering the fact that the introduction of s. 7(6)(a) of the LCA was done at the same time as the LFSSA. (para 17)

(3) The respondent's authority, as conferred by s. 4A of the LFSAA to issue the guidelines was not just '... to clarify any provision ...' of the LCA and to '… facilitate compliance with the law ...' but also '… <u>any other matters relating to Labuan financial services</u>.' The requirement for the approval surely falls within the scope of the underlined words above as does the authority to impose and collect the fees which is even specifically provided in s. 189 of the LFSSA. Section 7 of the LCA is a general provision whereas the Third Schedule of the LFSSR made under the LFSSA, and the guidelines made under the LFSSR, were specifically enacted and made, respectively, for the leasing transactions. The LFSSA is a comprehensive statute dealing with '… licensing and regulation of financial services and securities in Labuan ...' and under s. 86 of the LFSSA, leasing business falls under financial business. Section 189 of the LFSSA specifically empowered the respondent to, *inter alia*, prescribe fees for the activities of a licensed or registered entity when any consent, licence or registration is granted. Where there are two provisions of written law, one general and the other specific, the special or specific provisions exclude the operation of the general provision. The Latin version of that principle is *generalibus specialia derogant*. (paras 18 & 19)

(4) The respondent's power, as provided in ss. 9 and 28B of the LFSAA, includes the power to request for information not just on that of the applicant but its customer as well. Such an information had been given to the respondent by the said company on behalf of the appellant. Given that this is part and parcel of the respondent's power, not just as the chief supervisor but also the main regulator and enforcer of Labuan's international business and financial services industry, the need to notify it of the leasing transactions under the LFSSA was redundant for it already possessed all the information necessary for the execution of its statutory powers. (para 20)

(5) Given such wide powers of the respondent and in view of s. 40 read with s. 95 of the Interpretation Acts 1948 and 1967, it has the implied power to enforce it by, *inter alia*, making a subsidiary legislation and to impose conditions when granting a licence or giving its approval. The guidelines made under the LFSSR to facilitate the exercise of the said power has the force of law and the LFSSR was not *ultra vires* s. 7(6) of the LCA. (para 21)

Bahasa Melayu *Headnotes*

Responden ditubuhkan bawah Akta Lembaga Perkhidmatan Kewangan Labuan 1996 ('ALPKL'). Seksyen 3(2) ALPKL memperuntukkan bahawa responden ialah pihak berkuasa pengawalseliaan, penyeliaan dan penguatkuasaan pusat bagi industri perniagaan antarabangsa dan perkhidmatan kewangan di Labuan. Seksyen 4 ALPKL selanjutnya memperuntukkan kuasa buat responden untuk bukan sahaja mentadbir dan menguatkuasakan ALPKL tetapi juga undang-undang yang dinyatakan dalam Jadual ('undang-undang Labuan'). Perayu, sebuah syarikat pemajakan yang berdaftar bawah Akta Syarikat Labuan 1990 ('ASL'), terletak bawah rangkuman seliaan dan kawal selia responden. Pada asalnya, responden telah memberi kebenaran kepada perayu untuk memajakkan pelantar minyak kepada satu residen Malaysia. Peraturan-Peraturan Perkhidmatan Kewangan dan Sekuriti Labuan 2010 ('PPPKSL') menetapkan fi berjumlah RM60,000 untuk kebenaran transaksi tunggal pemajakan kepada residen dan fi RM20,000 untuk transaksi terkemudian dengan residen Malaysia. Perayu memeterai satu transaksi terkemudian pemajakan tanpa kebenaran responden dan tanpa membayar apa-apa fi pemajakan bawah PPPKSL. Perayu terlewat memohon kebenaran 20 bulan kemudian dan responden menolak permohonan dan rayuan-rayuan perayu. Responden akhirnya memberi kebenaran tetapi kebenaran ini tidak bersifat retrospektif ('keputusan responden'). Walaupun menerima keputusan responden dan membayar RM20,000, perayu memulakan satu permohonan semakan kehakiman di Mahkamah Tinggi untuk, antara lain, satu perintah *certiorari* membatalkan keputusan responden. Dalam permohonannya, perayu memohon, antara lain, satu pengisytiharan bahawa Garis Panduan Pertubuhan dan Pengendalian Perniagaan Pemajakan Labuan ('garis panduan') tidak mempunyai kuasa undang-undang kerana hanya bertujuan menjelaskan tentang syarat-syarat bawah ALPKL. Permohonan tersebut ditolak oleh Mahkamah Tinggi atas alasan (i) Garis panduan bukanlah tidak selaras dengan s. 7(6) ASL atau mana-mana undang-undang Labuan kerana s. 7 ialah peruntukan umum tentang had syarikat Labuan dalam menjalankan perniagaan dengan residen dan bukan khusus dengan syarikat Labuan yang

mempunyai lesen pemajakan; (ii) PPPKSL secara khusus berurusan dengan pungutan fi oleh responden, seperti yang dibenarkan oleh s. 189 ALPKL setelah mendapat kebenaran transaksi pemajakan dan yang terkemudian; (iii) Garis panduan mempunyai kuasa undang-undang kecuali jika bertentangan dengan perundangan utama kerana responden mempunyai kuasa menguatkuasakan kesemua Akta-Akta Labuan dan diberi kuasa mengeluarkan garis panduan 'untuk menjelaskan mana-mana peruntukan' Akta-Akta Labuan atau 'mana-mana hal perkara berkaitan perkhidmatan kewangan Labuan'; (iv) syarat memperoleh kebenaran untuk transaksi terkemudian pemajakan terangkum dalam kuasa responden; (v) pihak berkuasa menyelia yang diberi kuasa bawah statut oleh Parlimen mesti dibenarkan mengeluarkan garis-garis panduan dan mengutip fi; (vi) pemohon, setelah menerima lesen pemajakan yang bersyarat, yang salah satunya pematuhan garis panduan dan PPPKSL, tidak boleh memohon relief dan mengubah syarat-syarat yang dinyatakan dalam lesen; dan (v) keengganan responden memberi kebenaran retrospektif bukan satu penjalanan tidak munasabah kuasa pentabiran kerana perayu terlampau lewat memohon kebenaran selama hampir 20 bulan dan terdapat penolakan-penolakan awal kebenaran yang dipohon oleh perayu. Keputusan Mahkamah Tinggi disahkan oleh Mahkamah Rayuan. Maka timbul rayuan ini.

Diputuskan (menolak rayuan dengan kos)
Oleh Rhodzariah Bujang HMP menyampaikan penghakiman mahkamah:

(1) Perayu hanya membuat permohonan kebenaran transaksi pemajakan hampir 20 bulan selepas memasuki transaksi tersebut. Penting juga untuk mempertimbangkan tindakannya yang menerima kebenaran tidak retrospektif untuk transaksi tersebut dengan membuat bayaran. Tindakan penuh sedar oleh perayu, dilihat secara kumulatif, semestinya diputuskan terhadapnya kerana ini membangkitkan pemakaian prinsip undang-undang.

(2) Walaupun, pada dasarnya, peruntukan-peruntukan undang-undang memperlihatkan bahawa pengecualian keperluan syarikat Labuan untuk memaklumkan responden akan aktiviti berlesen dengan residen bawah ALPKL atau Akta Perkhidmatan Kewangan dan Sekuriti Islam Labuan 2010 ('APKSIL') bahawa sememangnya terdapat kebebasan undang-undang, walau bagaimanapun apabila mempertimbangkan bahawa pihak berkuasa yang mesti dimaklumkan (bawah s. 7(5) ASL) dalam ASL adalah pihak yang sama yang berkuasa memberi kebenaran transaksi bawah garis panduan, pengecualian tersebut satu penggunaan akal. Kenapa perlu memaklumkannya apabila dia yang memberi kebenaran? Ini pastinya satu kelewahan tindakan yang bertentangan dengan logik dan pertentangan ini lebih jelas selepas mengambil kira fakta bahawa pengenalan s. 7(6)(a) ASL dibuat pada masa sama dengan ALPKL.

(3) Kuasa responden, seperti yang diberikan oleh s. 4A ALPKL untuk mengeluarkan garis panduan bukan sekadar '… menjelaskan mana-mana peruntukan …' ASL dan untuk 'membantu pematuhan undang-undang …' tetapi juga '… mana-mana hal perkara berkaitan perkhidmatan kewangan Labuan'. Syarat kebenaran ini pastinya terangkum dalam perkataan-perkataan yang digariskan di atas dan begitu juga dengan kuasa mengenakan dan mengutip fi yang juga diperuntukkan secara khusus bawah s. 189 ALPKL. Seksyen 7 ASL ialah peruntukan umum manakala Jadual Ketiga PPPKSL yang dibuat bawah ALPKL, dan garis panduan yang dibuat bawah PPPKSL, masing-masing khusus digubal dan dibuat, untuk transaksi pemajakan. ALPKL ialah statut menyeluruh yang berurusan dengan '… pelesenan dan penyeliaan perkhidmatan kewangan dan sekuriti di Labuan …' dan bawah s. 86 ALPKL, perniagaan pemajakan terangkum bawah perniagaan kewangan. Seksyen 189 ALPKL secara khusus memberi responden kuasa untuk, antara lain, menyatakan fi aktiviti-aktiviti untuk entiti berlesen atau berdaftar apabila mana-mana kebenaran, lesen atau pendaftaran diberi. Apabila terdapat dua peruntukan undang-undang bertulis, satu umum dan satu khusus, peruntukan-peruntukan khas atau khusus mengecualikan operasi peruntukan umum. Versi Latin prinsip ini ialah *generalibus specialia derogant*.

(4) Kuasa responden, seperti yang diperuntukkan bawah ss. 9 dan 28B APKSIL, termasuklah kuasa memohon maklumat tentang bukan sahaja pemohon tetapi juga pelanggannya. Maklumat sedemikian telah diberi kepada responden oleh syarikat tersebut bagi pihak perayu. Oleh kerana ini sebahagian kuasa responden, bukan sahaja sebagai ketua penyelia tetapi juga penyelia dan penguat kuasa utama perniagaan antarabangsa dan industri perkhidmatan kewangan, keperluan memaklumkannya tentang transaksi pemajakan adalah lewah kerana responden sudah mempunyai kesemua maklumat penting untuk penguatkuasaan kuasa statutorinya.

(5) Berdasarkan kuasa meluas responden dan berdasarkan s. 40 yang dibaca bersekali dengan s. 95 Akta Tafsiran 1948 dan 1967, responden mempunyai kuasa menguatkuasakannya dengan, antara lain, membuat perundangan subsidiari dan mengenakan syarat-syarat apabila memberi lesen atau kebenarannya. Garis panduan yang dibuat bawah PPPKSL untuk membantu penjalanan kuasa tersebut mempunyai kuasa undang-undang dan PPPKSL tidak *ultra vires* s. 7(6) ASL.

Case(s) referred to:

Associated Provincial Pictures Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223 ***(refd)***

Boddington v. British Transport Police [1999] 1 AC 143 ***(refd)***

Express Newspaper Plc v. News (UK) Ltd & Others [1990] 3 All ER 376 ***(refd)***

Kerajaan Malaysia v. Wong Pot Heng & Anor [1997] 2 CLJ 188 FC ***(refd)***

Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd & Another Appeal [2004] 2 CLJ 265 FC ***(refd)***

Legislation referred to:

Interpretation Acts 1948 and 1967, ss. 23, 40, 95
Labuan Business Activity Tax Act 1990, s. 2
Labuan Companies Act 1990, ss. 4, 7(5), (6)(a)
Labuan Financial Services Authority Act 1996, ss. 4A, 9, 28B
Labuan Financial Services and Securities Act 2010, ss. 86, 87, 92, 189
Labuan Financial Services and Securities Regulations 2010, Third Schedule
Offshore Banking Act 1990 (repealed), ss. 23A, 23B
Offshore Companies Act 1990, s. 7(1), (3)

For the appellant - Mohd Arief Emran Arifin, Jason Liang, Kellie Allison Yap & Rachel Yey; M/s Wong & Partners

For the respondent - William Lim Wee Chong, Nur Izzati Rosli & Sylvie Tan Sze Ni; M/s Ariff Rozhan & Co

[Editor's note: For the Court of Appeal judgment, please see Nabors Drilling (Labuan) Corporation v. Lembaga Perkhidmatan Kewangan Labuan [2020] 7 CLJ 496 (affirmed).
For the High Court judgment, please see [2019] 1 CLJ 277 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Rhodzariah Bujang FCJ:

[1] The appellant in this appeal before us is a wholly-owned subsidiary of Nabors Drilling International II Limited and registered under the Labuan Companies Act 1990 ("the Act"). The respondent, on the other hand is the central regulatory, supervisory and enforcement authority set up under the Labuan Financial Services Authority Act 1996 ("the Financial Services Authority Act") which is empowered under s. 4 of the said Act to enforce not just that Act but as per its Schedule, seven others, including the Act and they are:

(i) Labuan Business Activity Tax Act 1990 (Act 445);

(ii) Labuan Trusts Act 1996 (Act 554);

(iii) Labuan Foundations Act 2010 (Act 706);

(iv) Labuan Islamic Financial Services and Securities Act 2010 (Act 705);

(v) Labuan Limited Partnerships and Limited Liability Partnerships Act 2010 (Act 707);

(vi) Labuan Financial Services and Securities Act 2010 (Act 704).

[2] On 17 June 2002, the respondent granted a licence to the appellant to undertake a leasing business in Labuan under s. 92 of the Labuan Financial Services and Securities Act ("Financial Services and Securities Act") and also gave its approval to the appellant to deal with Pool International (M) Sdn. Bhd. That licence was, on the appellant's own application, terminated on 22 January 2010 by the respondent when the appellant ceased its leasing business activity in Labuan but which business was rejuvenated subsequently by the respondent's grant of another licence to the appellant, upon the latter's application, on 13 July 2011. *Vide* the same letter, the appellant was granted an approval by the respondent to lease one unit of an offshore platform drilling rig, ie, Rig 488 to NDIL Malaysia Sdn. Bhd ("Ndil Malaysia") and payment of the requisite fees of RM60,000 as stipulated under the Labuan Financial Services and Securities Regulations 2010 ("the Regulations") was made by the appellant.

[3] The crux of this litigation woe lies not with the said leasing of Rig 488 but a subsequent one to the same company, that is Rig 503 which was done without the approval of the respondent and without payment of the requisite fees of RM20,000. RM20,000 is the stipulated fee under the Regulations for a subsequent transaction with a Malaysian resident, which NDIL Malaysia is. The appellant's belated application for approval made in its letter dated 28 October 2013, but served on the respondent on 24 January 2014 was rejected by the respondent on 6 May 2014. Likewise, its two appeals against that rejection made on its own and through its agent, Deloitte, respectively, after the appellant was ordered to pay a penalty of RM10,000 *via* the respondent's letter dated 27 June 2014 for the said business transgression.

[4] The appellant did not give up on its endeavour to get the approval from the respondent for the lease of Rig 503 and its third attempt actually bore fruit when the respondent acceded to its request on 9 April 2015 and granted the approval upon payment of RM20,000 but that approval was not made retrospective. The appellant accepted the decision and effected the payment. However, three months after the said approval, the appellant filed a judicial review application before the High Court for, *inter alia*, a *certiorari* to quash that decision of the respondent which the learned High Court Judge ("HCJ") (as His Lordship then was) dismissed and which decision was affirmed by the Court of Appeal on appeal. On 22 August 2019, the appellant was granted leave to appeal to this court against the said decision on this one question of law:

Is Paragraph 8.2 of the 2013 Guidelines on the Establishment and Operations of Labuan Leasing Business contrary to and *ultra vires* of Section 7(6) of the Labuan Companies Act 1990?

[5] In its judicial review application, the appellant had included as one of its prayers, a declaration that the above-mentioned guidelines do not have the force of law for it serves only to clarify the requirements under the Financial Services and Securities Act. Before delving into the matter further, it is best to first mention, as did the learned HCJ in his judgment, that the above guidelines are issued by the respondent under s. 4A of the Financial Service Authority Act which reads as follows:

4A. Power to issue guidelines.

(1) The Authority may, in respect of this Act or the laws specified in the Schedule or any other matter relating to Labuan financial services, issue guidelines to clarify any provision of this Act or the laws specified in the Schedule to facilitate compliance with the law by a Labuan financial institution or any other matters relating to Labuan financial services.

(2) The Authority may amend or revoke any guideline issued under this section.

[6] Paragraph 8.2 of the guidelines read:

8.2 Subsequent leasing transactions with Malaysian residents are subject to Labuan FSA's prior approval and payment of subsequent transaction fee.

The relevant provisions of s. 7 of the Act reads:

7. Permitted purpose for incorporation.

(1) A Labuan company may be incorporated for any lawful purpose and, subject to any other written laws on financial services applicable to Labuan, shall carry out business only in, from or through Labuan.

(2) Subject to subsection (3), a Labuan company may carry on a business with a resident.

...

...

(5) Where a Labuan company carries on a business with a resident, the Labuan company shall notify the Authority of any transactions between the Labuan company and the resident within ten working days of such transactions.

(6) Notwithstanding subsection (5), a Labuan company is not required to notify the Authority of transactions between the Labuan company and the resident where:

A (a) the Labuan company carries on any licensed activity with a resident under the Labuan Financial Services and Securities Act 2010 or the Labuan Islamic Financial Services and Securities Act 2010.

Judgment Of The High Court

B **[7]** The learned HCJ held that the guidelines are not inconsistent with s. 7(6) of the Act or any other Labuan laws because the said s. 7 is a general provision on a Labuan company's limitation when carrying out business with a resident and not specifically with a Labuan company with a leasing licence. On the other hand, the LFSS Regulations specifically deals with collection of fees by the respondent as authorised by s. 189 of the Financial Services C and Securities Act upon approval of a leasing transaction and a subsequent one.

[8] His Lordship further held that the guidelines have the force of law unless it contradicts the primary legislation for the reason that the respondent has been empowered to enforce all the Labuan Acts as enumerated earlier D and was given the power to issue guidelines "to clarify any provision" of the said Labuan Acts or "any other matters relating to Labuan financial services." The requirement to obtain its approval for a subsequent leasing transaction falls squarely within that authority of the respondent. It stands to reason, said His Lordship that a regulatory authority that is statutorily E empowered by Parliament should be allowed to issue guidelines and collect fees and furthermore, the appellant had accepted the leasing licence with conditions, one of which is compliance with the guidelines and the Regulations. Therefore, said His Lordship, it cannot seek relief to overturn the conditions stated in the licence.

F **[9]** Lastly, the learned HCJ held that the respondent's refusal to grant retrospective approval was not an unreasonable exercise of administrative power as held in *Associated Provincial Pictures Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223 considering that the appellant had inordinately delayed seeking that approval by about 20 months and there had been earlier G rejections of the retrospective approval sought by the appellant *vide* the respondent's letter dated 6 May 2014 and 16 December 2014.

The Court Of Appeal Judgment

[10] The Court of Appeal's reasons for dismissing the appellant's appeal H are contained in paras. 17-20 of the judgment which we would reproduce below:

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[17] We found no merit in the argument. First of all, the respondent, being the central regulatory, supervisory and enforcement authority of the Labuan International Business and Financial Centre, has the power to issue the Guidelines pursuant to section 4A of the LFSAA.

We agree with learned counsel for the respondent that there is nothing *ultra vires* or unlawful about the requirement for payment of fee and to obtain the respondent's approval for every subsequent leasing transaction. In fact, the respondent itself in its Affidavit (2) admitted that "... the payment of the RM20,000 is correct in law, as subsequent leasing require payment to the Respondent ...

[18] It is clear to us that Item 8.2 of the Guidelines, which stipulates that "Subsequent leasing transactions with Malaysian residents are subject to Labuan FSA's prior approval and payment of subsequent transaction fee", is *intra vires t*he respondent's powers and functions and is not inconsistent with the provisions of the LCA, the LFSAA and the LFSSR. In fact, the LFSSR makes it clear that approval for all Labuan leasing transactions is required, be it first leasing transactions or subsequent leasing transactions, or with residents or non-residents. However, a fee is only payable for leasing transactions involving Malaysian residents.

[19] Further, the authority to collect fees for a subsequent leasing transaction with a resident is already provided for in the third schedule of the LFSSR. Section 7(6) of the LCA merely provides generally that for any licensed activity, notification is not required in respect of transactions with a Malaysian resident. It is stretching the argument to suggest that since not even a notification is required by section 7(6) of the LCA, it follows that no approval is required for any subsequent leasing transaction, notwithstanding Item 8.2 of the Guidelines.

[20] In any event, the LFSSA being a specific legislation which "provide for the licensing and regulation of financial and securities in Labuan", it prevails over the LCA with regard to Labuan licensed activities, which includes leasing business as carried out by the respondent. The maxim *generalia specialibus non derogant* applies. The learned judge was therefore right in holding that section 8.2 of the Guidelines does not contradict section 7(6) of the LCA.

The Appeal

[11] In an effort to persuade us to depart from that concurrent decisions of the lower courts, learned counsel for the appellant had in his submission taken us through the legislative history governing the financial services in Labuan particularly on the requirement of approval before conducting such a business. It started off with s. 7(1) and 7(3) of the Offshore Companies Act 1990 which require an offshore company to obtain the permission of the Registrar before it could conduct any business with a resident of Malaysia. Section 23A of the Offshore Banking Act 1990 read with s. 23B requires

registration of an offshore financial business before the business can be conducted. Section 2 of the Labuan Business Activity Tax Act 1990 defines a Labuan company as one incorporated under the Act and includes a foreign Labuan company registered under the Act.

[12] The first two Acts mentioned above have been repealed and replaced with the Act where, as reproduced earlier, under s. 7(5), the requirement for approval of the Registrar has been substituted with a requirement to notify the authority, that is the respondent as qualified by s. 7(6). These new legislative provisions submitted learned counsel for the appellant show liberalisation of the law where now under s. 7(6) there is not even a requirement to notify the respondent of the transactions between a Labuan company and a resident for a licensed activity under the Financial Services Authority Act. The Financial Services Authority Act, submitted learned counsel further, does not prescribe a requirement for any leasing transaction either with a resident or with any party to be specifically approved by it, only that under s. 87 thereof the party intending to do that business must obtain a licence from the respondent and the respondent is entitled under s. 189 to collect licence/fees from the successful applicant. Therefore, the guidelines made under the Regulations which is subsidiary to it cannot impose the requirement for the approval especially when viewed in light of s. 196 of the Financial Services and Securities Act which provides as follows:

> **Section 196**
>
> The Minister may, on the recommendation of the Authority, make regulations prescribing all matters and things required by this Act to be prescribed or provided, for the carrying out of, or giving full effect to, the provisions of this Act.

[13] The aforesaid power, according to learned counsel only allows the Minister to issue regulations on any matters that are required to be prescribed or provided for in the said Act but does not entitle him to make any additional requirements unless that is specifically provided for in the Financial Services and Securities Act which only requires, as stated earlier, a licence. Learned counsel referred to this court's decision in *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn. Bhd & Another Appeal* [2004] 2 CLJ 265; [2005] 3 MLJ 97, which held that it is a well-settled principle that a provision in a statute conferring power on a member of the Executive to enact subsidiary legislation must be construed strictly and following the decision of *Kerajaan Malaysia v. Wong Pot Heng & Anor.* [1997] 2 CLJ 188; [1997] 1 MLJ 437, a person is empowered to make subsidiary legislation only when the parent Act provides the person with such power. He also raised s. 23 of the Interpretation Acts 1948 and 1967 which clearly provides:

23. Avoidance of subsidiary legislation in case of inconsistency with Act.

(1) Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.

(1A) For the purposes of subsection (1), any subsidiary legislation made under an Act is not inconsistent with that Act or any other Act merely by reason of the absence in the Act under which it is made of any provision relating to the commencement, application, operation, interpretation or construction of the subsidiary legislation or to any other matter in connection with such subsidiary legislation if provisions relating to the commencement, application, operation, interpretation or construction of, or other matter in connection with, subsidiary legislation generally are contained in this Act.

(2) In this section "Act" includes a federal law styling itself an Ordinance or Enactment.

[14] The appellant's counsel concluded his submission on this issue by this statement:

> 53. Parliament does not legislate in vain, the purpose of the said changes must be considered and promoted. The intention of Parliament to remove the requirement for approvals once a party is duly licensed should be respected by the Respondent and it should not be allowed to impose the said requirement through subsidiary legislation.

[15] As for the Court of Appeal's remark that the respondent did not previously challenge the guidelines and in fact accepted it, that conduct does not, submitted learned counsel, remedy the subsidiary legislation which is unlawful or *ultra vires* and cited the House of Lords decision in *Boddington v. British Transport Police* [1999] 1 AC 143 which we must say is not relevant on the facts before us because there the issue was whether the appellant could challenge the validity of the Railways bylaws 1965 before the stipendiary Magistrate where he was charged for violating Bylaw 20. The quotation from the cited case highlighted by learned counsel for our consideration at p. 158 of the report, *to wit*:

> The *Anisminic* decision established, contrary to previous thinking that there might be error of law within jurisdiction, that there was a single category of errors of law, all of which rendered a decision *ultra vires*. No distinction is to be drawn between a patent (or substantive) error of law or a latent (or procedural) error of law. An *ultra vires* act or subordinate legislation is unlawful *simpliciter* and, if the presumption in favour of its legality is overcome by a litigant before a court of competent jurisdiction, is of no legal effect whatsoever.

is, with respect, of no assistance to his client for the issue here is one of estoppel by conduct, that is, having accepted the validity of and made due compliance of the guidelines, should the appellant be allowed to mount the challenge on its validity now?

[16] Our answer to that is, a no because the above was not the only conduct of the appellant which militates against the grant of the reliefs sought but its lackadaisical attitude is another. As rightly raised by learned counsel for the respondent, the appellant only made the application for the approval of that leasing transaction for Rig 503 some 20 months after entering into that transaction. Equally important to consider is its other conduct in accepting the non-retrospective approval for the transaction by effecting the payment as stipulated in the respondent's decision dated 9 April 2015 which we had mentioned earlier. Such conscious conduct on the part of the appellant, viewed cumulatively must surely be held against it for it raises the application of the principle of law, in the words of Sir Nicholas Broune-Wilkinson VC in *Express Newspaper Plc v. News (UK) Ltd & Others* [1990] 3 All ER 376 "... that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance."

[17] Even if we were prepared to excuse the said behaviour of the appellant, we are still unable to accede to its appeal for the following reasons. Although on the surface it would appear from the legislative provisions mentioned above that the dispensation of the need by a Labuan company to notify the respondent of the licensed activity with a resident under the Financial Services and Securities Act or the Labuan Islamic Financial Services and Securities Act 2010 that there is indeed a liberalisation of the law as contended by the appellant, nevertheless when one were to consider the fact that the authority which must be notified (under s. 7(5)) or not notified (under s. 7(6)) in the Act is the very same authority who is empowered to grant the approval for the transaction under the guidelines, the said dispensation is pure common sense. Why is there a need to notify oneself when one has given the approval? That surely is pure redundancy of action which defies logic and that defiance is even more obvious when we consider the fact that the introduction of s. 7(6)(a) of the Act *vide* Act A1367, as submitted by learned counsel for the respondent, was done at the same time as the Financial Services and Securities Act.

[18] Further, as held by the learned HCJ, the respondent's authority as conferred by s. 4A of the Financial Services Authority Act to issue the guidelines is not just "... to clarify any provision ..." of the Act and to "... facilitate compliance with the law ..." but also "... any other matters relating to Labuan financial services." The requirement for the approval surely falls within the scope of the underlined words above as does the authority to impose and collect the fees as described earlier which is even specifically provided in s. 189 of the Financial Services and Securities Act. We are totally in agreement with the learned HCJ that s. 7 of the Act is a general provision whereas the Third Schedule of the Regulations, made under the Financial Services and Securities Act and thereafter the guidelines made under the Regulations are specifically enacted and made, respectively, for the leasing transactions. As submitted by learned counsel for the respondent, the Financial Services and Securities Act is a comprehensive statute dealing with "... licensing and regulation of financial services and securities in Labuan ..." and under s. 86 of the said Act, leasing business falls under financial business. The said Act under s. 189 specifically empowers the respondent to, *inter alia*, prescribe fees for the activities of a licensed or registered entity when any consent, licence or registration is granted. The full section reads:

> **Annual and licence fees**
>
> 189(1) The Authority may prescribe such annual, licence or registration fees by regulations in respect of the activities of a licensed or registered entity or other activities under this Act.
>
> (2) Such fees as may be prescribed shall be payable on or before 15 January of every year following the year in which any consent, licence or registration is granted.
>
> (3) An unpaid fees may be sued for by the Authority by action as a civil debt and in addition the Authority may require payment of a penalty for late payment up to an amount equivalent to twice the amount of the fees unpaid and costs of recovering the amount including but not limited to costs of legal proceedings.

The Third Schedule of the Regulations of course have expressly stipulated the fees for the leasing transaction upon approval being granted by the respondent.

[19] As rightly submitted by learned counsel for the respondent and held by the Court of Appeal, it is an accepted principle in the construction of statutes that where there are two provisions of written law, one general and the other specific, then the special or specific provisions exclude the operation of the general provision. The Latin version of that principle is *generalibus specialia derogant*.

[20] Furthermore, the respondent's power as provided in ss. 9 and 28B, respectively under the Financial Services Authority Act includes the power to request for information not just on that of the applicant but its customer as well. Learned counsel for the respondent pointed out, by referring to exh. LFSA9, that is, Deloitte's letter dated 16 June 2011 and 7 July 2011 annexed to its affidavit in reply (2) affirmed on 9 May 2017 (at pp. 1292 to 1297 of appeal record vol. 4), that such an information had been given to the respondent by the said company on behalf of the appellant. Again, given that this is part and parcel of the respondent's power, not just as the chief supervisor but also the main regulator and enforcer of Labuan's international business and financial services industry, the need to notify it of the leasing transactions under the Financial Services and Securities Act is again redundant for it already possessed all the information necessary for the execution of its statutory powers.

[21] Given such wide powers of the respondent and in view of s. 40 read with s. 95 of the Interpretation Acts 1948 and 1967, it has the implied power to enforce it by, *inter alia*, making a subsidiary legislation and to impose conditions when granting a licence or giving its approval. The guidelines made under the Regulations to facilitate the exercise of the said power, again was rightly held by the learned HCJ and the Court of Appeal to have the force of law and as held in their respective judgments, the Regulations is not *ultra vires* s. 7(6) of the Act. That is the very same view that we adopt here. The question of law posed is therefore answered in the negative and consequentially, the appeal is dismissed with cost.